No. 45393-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cody Johnson,

Appellant.

Thurston County Superior Court Cause No. 13-1-00225-0

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

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2. The trial court erred by entering four convictions based on a single unit of prosecution.

3. Mr. Johnson committed at most one unit of harassment.

> **ISSUE 1:** A single unit of prosecution may not give rise to multiple convictions for an offense without violating double jeopardy. Here, the jury convicted Mr. Johnson of four counts of harassment based on a 30-45 minute interaction during which Mr. Johnson made threats directed at a single person. Did the court violate Mr. Johnson's protection against double jeopardy under the Fifth and Fourteenth Amendments?

4. Mr. Johnson was denied his state constitutional right to a unanimous verdict on each charge.

5. The trial court erred by failing to give a unanimity instruction, where the state argued that multiple acts supported each charge.

6. The trial court erred by instructing jurors on alternative means of committing misdemeanor harassment.

7. The trial court erred by entering convictions for misdemeanor harassment, where the evidence was insufficient to support one alternative means of committing that crime.

> **ISSUE 2:** The state constitutional right to a unanimous verdict requires the court to provide a unanimity instruction in a "multiple acts" case. Here, the state presented evidence of numerous threats, and argued that multiple acts supported conviction on each charge. Did the court's failure to give a unanimity instruction violate Mr. Johnson's right to a unanimous verdict?

ISSUE 3: The state constitutional right to a unanimous verdict requires unanimity as to the means by which an offense was committed. Here, the jury was instructed on two alternative means of committing misdemeanor harassment, but insufficient evidence supported one of the alternative means. Did the convictions for misdemeanor harassment violate Mr. Johnson's right to jury unanimity as to means?

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14. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 4: An out-of-state conviction does not add a point to the offender score unless the state proves that it is comparable to a Washington felony. Here, the court added points to Mr. Johnson's offender score based on Oregon convictions for offenses which are defined more broadly than the analogous Washington offenses. Did the court err by adding points to Mr. Johnson's offender score based on non-comparable out-of-state convictions?

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17. Mr. Johnson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

18. Defense counsel was ineffective for failing to object to the inclusion in the offender score of Oregon convictions that were not comparable to Washington felonies.

19. Defense counsel was ineffective for failing to object to the inclusion in the offender score of prior class B and C felonies that washed out.

> **ISSUE 6:** Defense counsel provides ineffective assistance by failing to object to the inclusion of non-comparable out-of-state convictions in an offender score. Here, Mr. Johnson's attorney did not object to the inclusion of five prior Oregon convictions that were not comparable to any Washington felony in his offender score, and did not object to the inclusion of prior class B and C felonies that had washed out. Was Mr. Johnson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cody Johnson and Justin Bingley lived next door to each other in rural Thurston County. RP 41-43. Bingley's property was fenced and had a gate in front. RP 50-51, 71.

From time to time, Mr. Johnson stood outside in his yard, yelling and talking to himself. On February 12, 2013, Bingley called the police. RP 44-46, 110, 132. Deputy Griffin spoke to Bingley, and said that if Mr. Johnson was on his own property and did not make any threats, the police would not become involved. RP 131-132. In fact, Deputy Griffin suggested that Bingley not interact with Mr. Johnson and let him wear himself out. This had worked in the past. RP 130-133.

Minutes later, Bingley called police again. He claimed that Mr. Johnson had moved onto his property and was now making threats.[1] This prompted the police to respond. RP 46-50, 67-80, 130-137. Mr. Johnson was arrested, and charged with two counts of felony harassment and two counts of misdemeanor harassment. CP 7-8.

At trial, Bingley testified that the interaction lasted 30-45 minutes and that Mr. Johnson made numerous threats during that time. RP 80,

[1] Mr. Johnson remained outside the fenced area. RP 101.

116. Mr. Johnson yelled these statements from the gate, about 200 feet from where Bingley stood on his porch. RP 71.

Bingley confirmed that Mr. Johnson never came into the fenced area. RP 101. He said that Mr. Johnson walked away from the gate a few times, out of the floodlights, and then back. RP 71-72. According to Bingley, Mr. Johnson threatened to kill Bingley and his family, claimed Bingley had buried his own daughter in his yard, called Bingley a rapist, and described an encounter he'd had with a man pretending to be a woman. RP 67, 69, 74, 75, 78.

The state sought four convictions from this 30-45 minute interaction. During closing argument, the prosecutor told jurors "[Y]ou don't all have to agree on which threat of which [sic], it is as long as you agree that one of those that I've pointed to occurred during the time periods that I've indicated." RP 230-231. The court did not give a unanimity instruction. CP 10-23.

The court instructed jurors on two alternative means of committing misdemeanor harassment: threatening to "cause bodily injury immediately or in the future to [Bingley] or any other person", and threatening to "cause physical damage to the property of [Bingley] or any other person." CP 20-21. The court did not provide an instruction requiring unanimity as

to means, or special verdict forms allowing jurors to specify the alternative means upon which they voted to convict.

The jury voted to convict on all four counts. CP 24.

At sentencing, the state alleged that Mr. Johnson had 11 prior felony convictions.[2] RP 279-280; Prosecutor's Statement of Criminal History, Supp. CP. Eight[3] were from Oregon, but the court did not engage in any comparability analysis. RP 279-294. The defense attorney did not address the issue at all.[4] RP 279-294. The court included seven Oregon convictions in Mr. Johnson's criminal history,[5] and counted them in the offender score. CP 25.

The prosecutor's statement of criminal history included a seventeen-year gap, from 1990-2007. The state did not provide any information indicating that Mr. Johnson was in custody during that period.[6] RP 279-294; Prosecutor's Statement of Criminal History, Supp. CP. Nor did the court make a finding that Mr. Johnson was in custody during any part of that seventeen-year period. CP 24-34. Despite this, the

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[2] The state also alleged that Mr. Johnson was on community custody at the time of the offense.

[3] Ultimately, one of the eight Oregon convictions was not included in the offender score.

[4] Defense counsel did indicate that excluding a disputed malicious mischief conviction would result in an offender score of 10. RP 279-280.

[5] The court did not consider an Oregon conviction for malicious mischief, because the prosecutor indicated she had no supporting documents. RP 280-281.

court included class B and C convictions from 1990 in Mr. Johnson's offender score. CP 25.

The court concluded Mr. Johnson had an offender score of 10, and sentenced him to 60 months in prison. RP 280-281; CP 28. Mr. Johnson timely appealed. CP 35.

ARGUMENT

I. THE COURT VIOLATED MR. JOHNSON'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

A. Standard of Review.

Double jeopardy is a constitutional issue, reviewed *de novo*. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013). A double jeopardy violation can be manifest error affecting a constitutional right, raised for the first time on review. RAP 2.5(a)(3); *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013) *review denied,* 179 Wn.2d 1017, 318 P.3d 280 (2014).

B. The facts of Mr. Johnson's case supported only one unit of prosecution for harassment.

The constitutional protection against double jeopardy prohibits multiple punishments for the same offense. *State v. Morales*, 174 Wn.

[6] Nor did the prosecutor prove when Mr. Johnson was released from custody, if he did serve

App. 370, 384, 298 P.3d 791 (2013); U.S. Const. Amend. V, XIV; Wash. Const. art. I, § 9. The analysis of whether multiple counts of the same offense violate double jeopardy turns on the unit of prosecution. *Id.*

The unit of prosecution for harassment does not depend on the number of threats uttered. *Id.* at 387. Instead, it turns on the number of people threatened and placed in reasonable fear. *Id.* The *Morales* court found that double jeopardy permitted only a single harassment conviction when the accused communicated threats directed at the mother of his children on two consecutive days to two different people. *Id.*

Mr. Johnson was accused of threatening Bingley numerous times over the course of thirty to forty-five minutes. RP 80. These facts can sustain only a single unit of prosecution for harassment. *Morales*, 174 Wn. App. at 387. As in *Morales*, Mr. Johnson allegedly threatened only one person. In Mr. Johnson's case, however, the threats were limited to a period of less than an hour. The entry of convictions for more than one count of harassment violated the protection against double jeopardy. *Id.*

The court violated Mr. Johnson's right to be free from double jeopardy by entering convictions for four counts of harassment when the facts supported only one unit of prosecution. *Id.* All but one of Mr. Johnson's convictions must be reversed. *Id.*

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time.

II. IF THE CONVICTIONS DON'T VIOLATE DOUBLE JEOPARDY, MR. JOHNSON WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A trial court's failure to provide a unanimity instruction is a manifest error affecting the constitutional right to a unanimous verdict. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be raised for the first time on appeal. *Moultrie,* 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).[7]

B. In a "multiple acts" case, the state must elect a particular act on which to proceed or the court must give a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict.[8] Wash Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors

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[7] There appears to be a split between Divisions I and II as to whether or not failure to provide a unanimity instruction automatically qualifies as manifest error affecting a constitutional right. *See, e.g., State v. Locke,* 175 Wn. App. 779, 802, 307 P.3d 771 (2013) (requiring appellant to demonstrate practical and identifiable consequences of error); *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) (same). The difference appears to have little practical effect, however, as Division II will analyze the merits of the claimed error to determine whether or not it qualifies for review.

[8] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon,* 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

must unanimously agree that he or she committed the charged criminal act. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

Where the prosecution introduces evidence of more than one act to support a single charge, the state must elect one act for conviction. If the prosecutor does not elect a single act, the court must provide a unanimity instruction as to that charge. *Id.* This requirement "protect[s] a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt." *Id.*

C. The prosecutor relied on multiple allegations to support each charge, and the court failed to give a unanimity instruction.

Here, the court did not give a unanimity instruction. CP 10-23. Nor did the prosecutor elect a specific threat to support each count.[9] Instead, she compounded the problem by specifically telling jurors during closing arguments that they could rely on multiple acts to establish each count.

Early in her closing, the state's attorney told jurors "there's multiple threats to kill in that first count and multiple threats of bodily injury, so don't get too hung up right now on the numbers is what I'm

[9] The prosecutor claimed there was "two clear breaks in time," and divided the four charges between these two time periods. RP 217. Her argument did not make clear what the two time periods were, and she seemed to confuse herself several times, arguing at one point that Mr. Johnson walked away and returned at least four times while still talking to Bingley. RP 226.

saying because you'll see them here again in a second,[10] but I want you to see that it happens multiple times over the course of these incidences [sic]." RP 217-218.

The prosecutor assigned a number to each alleged threat, but omitted number one from her list. At times she used the same list for each kind of threat; other times, she numbered threats of injury separately from threats to kill.[11] The numbers she used did not correspond to the numbering of the different counts charged in the Information.[12]

She started her list by referring to "threat to kill number two," which she said Mr. Johnson made while he was behind a tree when "he tells Bingley bring his gun and his knife and he'll kill them all." RP 217. She counted Mr. Johnson's statement that the police wouldn't protect Bingley as "[b]odily injury, threat number three" when combined with "all the other threats." RP 218. She cited Mr. Johnson's reference to a car accident as "an obvious threat to damage property" and also "bodily injury threat number four," describing it as a "twofer." RP 218. She described a threat to break Bingley's neck and told the jurors "you have bodily injury threat number five, but more specifically, I think you have threat to kill

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[10] Apparently, the prosecutor used a slide show during closing. She did not file a copy with the court.

[11] She also counted at least two alleged threats in more than one category.

number three." RP 222. Finally, she concluded her list by saying "then he threatens to beat the hell of the victim for judging him, so there's your bodily injury threat number six." RP 224.

After listing and numbering these threats, the prosecutor apparently put up a summary slide in an attempt to relate the various threats to the counts charged.[13] Having created an inconsistent numbering scheme, she confused the issue further with a rambling speech telling jurors they could rely on multiple threats to convict on each count, and by mixing up her numbering scheme with the number of each count:

> So you've got counts…, this is one encounter and this is really -- this is at least two, if not three, but Counts I and III would be up here for the first encounter at the gate and the tree line, so he's come down to the gate, he's moved away and he's come partly back and then he moves away again.
>
> And when you come down here to the third encounter at the gate, you've got Counts II and IV…. Let me start actually with Count I. You've got threat to kill one, threat to kill two, so you've got at least two threats to kills to choose from in terms of Count I. In terms of Count III, you've got one, two, three, four, and five for threat to damage property and bodily injury threat. Any of those five can count for Count III.
>
> When you talk about down here, the third encounter at the gate, when he goes back up to his own property and comes back down you've got threat to kill number three, which is this combination that I would submit to you. And you also have threat six where he's

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[12] At times, she made it sound as though there were nine or ten separate incidents: six or seven threats of bodily injury and three threats to kill. RP 216-230.

[13] The content of the slideshow was not made part of the trial court's record.

> going to beat the hell out of him for judging him… related to his criminal history. And then back down threatens to kick his ass in front of all his employees, threat number seven. So any of these three threats for bodily injury, and also you could break out this one if you're not -- break out the break your neck if you're not going to apply it to the threat to kill. But I submit to you that this is a threat to kill and you can't take it out of context the statement that immediately preceded it.
>
> So you've got one count of threat to kill or one threat to kill in this second encounter and that's your Count II, and then Count IV can be any of the remaining except for this. If you're going to take it out, threat five, and you're going to take that out by itself, Count VI or Count VII -- or threat six or threat seven for Count IV, so hopefully that visually makes more sense.
>
> The short version is there's a whole lot of threats going on during the course of that 30 to 45 minutes that they've described, but there are separate incidences involving there where two times, very specifically, where the victim described the defendant being at his gate and making threats, and in each of those instances there's multiple threats to kill and multiple bodily injury threats or threats to harm or do damage, physical damage to the victims that you can choose from.
> RP 228-230.

Assuming that the 30-45 minute encounter involved multiple separate incidents,[14] each conviction violated Mr. Johnson's right to a unanimous verdict.

The state charged Mr. Johnson with four counts of harassment. CP 7-8. The court did not instruct the jury that they had to unanimously agree which alleged threats had been proved beyond a reasonable doubt in order

[14] An assumption contested by Mr. Johnson in the argument on double jeopardy and the unit of prosecution.

to support each charge. CP 10-23. The prosecutor argued that the jury had multiple threats to "choose from" for each count, and told jurors they did not have to agree which threats had actually occurred. RP 229-30. Failure to provide a unanimity instruction violated Mr. Johnson's right to a unanimous verdict. *Coleman,* 159 Wn.2d at 511.[15]

Given the lack of a unanimity instruction and the prosecutor's argument that jurors could choose from the multiple acts, it is highly likely that jurors failed to agree when deciding each count. The violation requires reversal of Mr. Johnson's convictions. *Id.*

D. The court erred by failing to instruct the jury that they had to unanimously agree which of the alternative means of misdemeanor harassment Mr. Johnson had committed.

The right to a unanimous verdict also includes the right to jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support

[15]Even if the incident is described as a continuing course of conduct, the analysis does not change. Ordinarily, a single charge may be established through proof of a continuing course of conduct without need for a unanimity instruction. *State v. Monaghan*, 166 Wn. App. 521, 537, 270 P.3d 616 (2012), as amended (Feb. 28, 2012), *review denied,* 174 Wn.2d 1014, 281 P.3d 687 (2012). This case does not fall within that rule. The need for a unanimity instruction attaches here because the state charged Mr. Johnson with four counts. A single continuing course of conduct cannot support four separate charges. If the court denies Mr. Johnson's double jeopardy claim, then the jury had to unanimously agree on which threat

each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

If one or more alternatives are not supported by sufficient evidence, the conviction must be reversed. *Lobe,* 140 Wn. App. 897. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel,* 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Mr. Johnson was charged with two counts of misdemeanor harassment for threatening to cause bodily injury to Justin Bingley, or for threatening to cause physical damage to another person's property. CP 7-8. The jury was instructed on each of these alternative means. CP 18-20. But the court did not instruct the jury they had to unanimously agree which alternative had been proved beyond a reasonable doubt. CP 10-23.

The court's failure to give a unanimity instruction violated Mr. Johnson's right to a unanimous verdict because there was insufficient evidence to support one of the two alternatives. *Lobe,* 140 Wn. App. 897. Bingley testified to alleged threats against him and his family, but there

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supported each of the four charges. The trial court should have provided a unanimity instruction. *Coleman,* 159 Wn.2d at 511.

was insufficient evidence of any threat to damage Bingley's property. RP 40-105.

The prosecutor argued in closing that Mr. Johnson's alleged reference to a car accident was actually a threat to damage Bingley's truck. RP 218. First, no rational jury could find that a mention of a car accident was a threat to damage property beyond a reasonable doubt. *Engel,* 166 Wn.2d at 576. Second, even if the jury could find that the statement was a threat to damage property, that single threat cannot support that means in two different misdemeanor harassment charges.

The transcripts of the 911 calls, likewise, do not reveal any threats against Bingley's property. Exs. 1-10, Supp. CP. No rational trier of fact could have found beyond a reasonable doubt that Mr. Johnson threatened to damage Bingley's property. *Engel,* 166 Wn.2d at 576.

The court violated Mr. Johnson's right to a unanimous verdict by failing to provide a unanimity instruction when the evidence did not support one of the alternative means of committing harassment. *Lobe,* 140 Wn. App. 897. Mr. Johnson's misdemeanor harassment convictions must be reversed. *Id.*

III. THE COURT IMPROPERLY CALCULATED MR. JOHNSON'S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

B. Two of Mr. Johnson's out-of-state convictions should not have added points to his offender score because they are not comparable to Washington felonies.

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). Where the state alleges out-of-state convictions, the prosecution bears the burden of proving comparability. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves that it is comparable to a Washington felony. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of

the out-of-state statute are broader than its Washington counterpart, it would "(at least) raise serious Sixth Amendment concerns" to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied,* 11-9540, 2013 WL 4606326 (2013).

1. Mr. Johnson's Oregon conviction for unauthorized use of a vehicle is not comparable to a Washington felony.

The court found that Mr. Johnson had a 1990 conviction for taking of a motor vehicle in Oregon. CP 25. The court appears to have been referring to the Oregon offense of unauthorized use of a motor vehicle:

> (1) A person commits the crime of unauthorized use of a motor vehicle when:
> (c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such a vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

Former ORS 164.135 (1990). The most closely analogous statute to Oregon's unauthorized use of a vehicle is Washington's taking a motor vehicle without permission,[16] which states that:

> Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive

[16] In 1990, when Mr. Johnson's Oregon conviction is alleged to have occurred, Washington law only provided for one degree of taking of a motor vehicle without permission. The offense is now divided into two degrees. RCW 9A.56.070, 9A.56.075.

> away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of taking a motor vehicle without permission.

Former RCW 9A.56.070 (1990).

The Oregon statute under which Mr. Johnson was convicted is not comparable to a Washington felony because it criminalizes conduct not included in the analogous Washington statute. *Thiefault*, 160 Wn.2d at 415. Specifically, the Oregon offense encompasses situations in which a mechanic or other service-provider keeps possession of a vehicle for longer than agreed. Former ORS 164.135. The statute does not require the accused to drive or ride in the vehicle. The Washington statute criminalizes only taking, driving away, or riding in a vehicle without the owner's permission. Former RCW 9A.56.070. The two statutes are not legally comparable. *Thiefault*, 160 Wn.2d at 415.

The court erred by adding a point to Mr. Johnson's offender score based on an Oregon conviction for unauthorized use of a vehicle, which is not comparable to a Washington felony. *Id.* Mr. Johnson's case must be remanded for resentencing.

2. Mr. Johnson's Oregon conviction for first-degree criminal mischief is not comparable to a Washington felony.

The court found that Mr. Johnson had a prior conviction in Oregon for first-degree criminal mischief. CP 25. The Oregon statute reads:

> (1) A person commits the crime of criminal mischief in the first degree who, with intent to damage property, and having no right to do so nor reasonable ground to believe that the person has such a right:
> (a) Damages or destroys property of another:
> (B) By means of an explosive;
> (C) By starting a fire in an institution while the person is committed to and confined in the institution;
> (D) Which is a livestock animal as defined in ORS 164.055(2)(c);[17]
> (b) Intentionally uses, manipulates, arranges or rearranges the property of a public utility, telecommunications carrier, railroad, public transportation facility or medical facility used in direct service to the public so as to interfere with its efficiency.

Former ORS 164.365 (1990). The most closely analogous Washington statutes are for malicious mischief in the first and second degree. The 1990 Washington statute for first-degree malicious mischief provided that:

> (1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:
> (a) Causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars;
> (b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, or political

[17] Former ORS 164.055(2)(c) defined "livestock animal" as "a horse, gelding, mare, stallion, colt, mule, ass, jennie, bull, steer, cow, goat, sheep, lamb, llama, pig, or hog." Former ORS 164.055(2)(c) (1990).

subdivision thereof, or a public utility or mode of public transportation, power, or communication; or
(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

Former RCW 9A.48.070 (1990). The 1990 Washington statute for second degree malicious mischief stated:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:
(a) Causes physical damage to the property of another in an amount exceeding two hundred and fifty dollars;
(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or a mode of public transportation, power, or communication; or
(c) Notwithstanding RCW 16.52.070, causes physical damage, destruction, or injury by amputation, mutilation, or castration, or other malicious act to a horse, mule, cow, heifer, bull, steer, swine, goat, or sheep which is the property of another.

Former RCW 9A.48.080 (1990).

The Oregon statute under which Mr. Johnson was convicted proscribes conduct that is not a felony in Washington. The Oregon felony criminalizes any property damage caused by an explosive or by starting a fire in an institution. Former ORS 164.365. The same conduct would only have been a felony in Washington in 1990 if the state also proved that it caused damage exceeding $250.[18] Former RCW 9A.48.080.

[18] Although starting a fire or causing an explosion in Washington could constitute arson or reckless burning, all of the felony degrees of those offenses require proof of actual damage to property, danger to human life, or that the building be a dwelling. Former RCW 9A.48.040,

Likewise, Oregon criminalizes arranging or rearranging the property of a medical facility. Former ORS 164.365. That conduct is not reached by either of the Washington malicious mischief statutes. Former RCW 9A.48.070, 9A.48.080.

Finally, it is a felony in Oregon to cause any damage to a llama or an ass. Former ORS 164.365(1)(a)(D); Former ORS 164.055(2)(c). Those animals are not protected by the former Washington statute. Former RCW 9A.48.080(1)(c). The Oregon offense of first-degree criminal mischief is not legally comparable to a Washington felony. *Thiefault*, 160 Wn.2d at 415.

The court erred by adding a point to Mr. Johnson's offender score for an Oregon conviction that is not comparable to a Washington felony. *Id.* Mr. Johnson's case must be remanded for resentencing.

3. Mr. Johnson's three Oregon burglary convictions are not comparable to a Washington felony.

The court added a point to Mr. Johnson's offender score based on two prior Oregon convictions for first-degree burglary and one for second-degree burglary. CP 25. This was error, because the Oregon statutes do not require proof of intent to commit a crime against persons or property.

9A.48.030, 9A.48.020. The Oregon statute punishes a fire or explosion with the mere intent to damage property. Former ORS 164.365. At most, those subsections are comparable to misdemeanor reckless burning in Washington. Former RCW 9A.48.050.

Oregon's 1990 second-degree burglary statute read:

> A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit *a crime* therein.

Former ORS 164.215 (1990) (emphasis added). The 1990 Oregon first-degree burglary statute read:

> A person commits the crime of burglary in the first degree if the person violates ORS 164. 125 and the building is a dwelling, or if in effecting entry or while in immediately flight therefrom the person:
> (a) Is armed with a burglar's tool as defined in ORS 164.235 or a deadly weapon;
> (b) Causes or attempts to cause physical injury to any person; or
> (c) Uses or threatens to use a dangerous weapon.

Former ORS 164.225 (1990).

The corresponding Washington statutes provide that:

> A person is guilty of burglary in the second degree if, with intent to commit a crime *against a person or property* therein, he enters or remains unlawfully in a building other than a vehicle.
>
> and
>
> A person is guilty of burglary in the first degree if, with intent to commit a crime *against a person or property* therein, he enters or remains unlawfully in a dwelling…

Former RCW 9A.52.030 (1990) (emphasis added); Former RCW 9A.52.020 (1990) (emphasis added).

The Oregon statute is broader than both of its Washington counterparts. For example, a person in Oregon would be guilty of

burglary for unlawfully entering a building with intent to commit a drug crime inside. Former ORS 164.215. Because a drug offense is not a crime against a person or property, the same person would not be guilty of burglary in Washington. Former RCW 9A.52.030; Former RCW 9A.52.020.

The court erred by adding three points to Mr. Johnson's offender score for Oregon burglary convictions that are not equivalent to a Washington felony. *Thiefault*, 160 Wn.2d at 415. Mr. Johnson's case must be remanded for resentencing.

C. Mr. Johnson's sentence must be vacated because five of his prior convictions should have "washed out."

The state bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused's offender score. *Ford*, 137 Wn.2d at 480. Prior convictions for class C felonies are not included in an offender score if the accused has spent five consecutive years in the community without conviction following his/her conviction or release from confinement. RCW 9.94A.525(2)(c). Prior convictions for B felonies are not included if the accused has spent ten crime-free years in the community. RCW 9.94A.525(2)(b).

Improper inclusion of "washed out" convictions creates a sentence beyond the court's statutory authority. *In re Cadwallader*, 155 Wn.2d

867, 874, 123 P.3d 456 (2005). Such an error may be raised for the first time on appeal. *Id.*

The court found that Mr. Johnson had 1990 convictions in Oregon for, *inter alia,* unauthorized use of a motor vehicle, criminal mischief in the first degree, second-degree burglary, and two counts of first-degree burglary. CP 25. If those convictions are comparable to Washington felonies, they would be class B or C felonies.[19] Mr. Johnson's next conviction did not occur until seventeen years later. CP 25.

As argued above, Mr. Johnson's convictions for Oregon unlawful use of a vehicle under former ORS 164.135 and criminal mischief under former ORS 164.365 are not comparable to any Washington felony. If the court finds that they are comparable, however, it would be to Washington malicious mischief in the second degree and taking of a motor vehicle, both of which are class C felonies. Former RCW 9A.56.070; Former RCW 9A.48.080. Because had no new convictions for seventeen years, his convictions for unlawful use of a vehicle and criminal mischief should have washed out. RCW 9.94A.525(2)(c).

Similarly, Mr. Johnson's Oregon convictions for first and second degree burglary are not comparable to any Washington felony. But if they

[19] Although first degree burglary is a class A felony in Washington, Oregon's first degree burglary statute is comparable, at most, to second degree burglary in Washington.

were, they would all comparable only to Washington second degree burglary, a class B felony. Former ORS 164.225 (1990); Former ORS 164.215 (1990); Former RCW 9A.52.030 (1990).

Oregon's first degree burglary includes any burglary during which the accused possesses a burglar's tool. Former ORS 164.225 (1990). Possession of a burglar's tool does not alter the degree of burglary in Washington. Former RCW 9A.52.030, Former RCW 9A.52.020. Thus, Oregon's first degree burglary is only legally comparable to Washington's second degree burglary, a class B felony. *Thiefault*, 160 Wn.2d at 415. As a class B felony, the conviction should have washed because Mr. Johnson subsequently spent seventeen years without a new conviction. RCW 9A.48.080.

Oregon's second degree burglary criminalizes unlawfully entering or remaining in a building with intent to commit a crime therein. Former ORS 164.215 (1990). If Oregon second degree burglary is comparable to a Washington offense, it is to Washington's second degree burglary, a class B felony. Former RCW 9A.52.030. The conviction should have washed out. RCW 9A.48.080.

The state did not prove the facts necessary to include five of Mr. Johnson's 1990 convictions added points to his offender score. *Ford*, 137 Wn.2d at 480. Likewise the court's findings do not mention when Mr.

Johnson was released from custody on any of his prior offenses. CP 25.[20] The court's findings simply adopt the state's criminal history sheet, which does not mention when Mr. Johnson was released following any of his convictions. CP 25. The court's findings do not support the conclusion that Mr. Johnson's 1990 class B and C convictions add points to his offender score.

The court erred by using five convictions for class B and C felonies that had washed out to increase Mr. Johnson's offender score. RCW 9.94A.525(2)(c). The case must be remanded for resentencing. *Id.*

D. If the sentencing errors are not preserved, Mr. Johnson received ineffective assistance of counsel.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); U.S. Const. Amends. VI, XIV.

[20] Mr. Johnson did not stipulate that he was held in custody beyond his sentencing date on the 1990 convictions.. RP 279-94. Defense counsel made a statement that might constitute agreement to the offender score. However, as argued below, defense counsel's agreement to an offender score that included non-comparable out-of-state convictions and washed-out prior offenses constituted ineffective assistance.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by failing to object to the inclusion of legally non-comparable out-of-state convictions at sentencing. *Thiefault*, 160 Wn.2d at 417.

Mr. Johnson's attorney provided ineffective assistance of counsel by suggesting that his offender score should be ten, which included five seventeen-year-old out-of-state convictions that were not comparable to Washington felonies and had washed out. RP 279-80; *Thiefault*, 160 Wn.2d at 417. Counsel had no valid tactical reason for permitting the court to erroneously increase his client's offender score by five points. *Kyllo*, 166 Wn.2d at 862.

Mr. Johnson was prejudiced by his attorney's deficient performance. *Id.* As outlined above, Mr. Johnson's Oregon convictions for unauthorized use of a vehicle, criminal mischief, and first and second degree burglary were not legally comparable to any Washington felony. Additionally, all five of those 1990 convictions should have washed out.

There is a reasonable probability that counsel's failure to raise these issues affected Mr. Johnson's sentence. *Id.*

Defense counsel provided ineffective assistance by failing to object to the inclusion of non-comparable out-of-state convictions and washed out convictions in Mr. Johnson's offender score. *Id.*; *Thiefault*, 160 Wn.2d at 417. Mr. Johnson's case must be remanded for resentencing. *Id.*

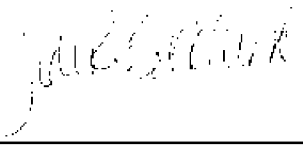
CONCLUSION

The court violated the protection against double jeopardy by entering four harassment convictions when the facts supported only one unit of prosecution. Mr. Johnson was denied his right to a unanimous verdict by the court's failure to instruct the jury that they had to unanimously agree which act supported each count and which of the alternative means of misdemeanor harassment Mr. Johnson had committed. Mr. Johnson's convictions must be reversed.

In the alternative, the sentencing court erred by increasing Mr. Johnson's offender score based on five out-of-state convictions that were not comparable to Washington felonies and had "washed out." If the sentencing errors are not preserved, Mr. Johnson received ineffective assistance of counsel. Mr. Johnson's case must be remanded for resentencing.

Respectfully submitted on April 14, 2014,

BACKLUND AND MISTRY



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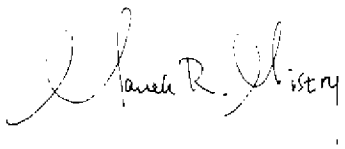

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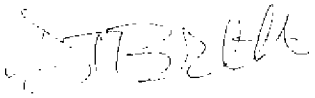

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Cody Johnson, DOC #946586
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PO Box 777
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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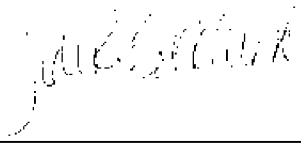
paoappeals@co.thurson.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 14, 2014.



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